Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BENSON REALTY CORP., CHAI ASSOCIATES, INC., HINCKLEY REALTY CORP., 615 EAST 168TH ST. CORP., ROBERT BEREZIN, SHIRLEY BEREZIN, MORRIS FADER, ANITA FADER, COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., BRONX REALTY ADVISORY BOARD, INC., ASSOCIATED BUILDERS & OWNERS OF GREATER NEW YORK, INC., AND 383 EAST 17TH ST. INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

EDWARD KOCH, AS MAYOR OF THE CITY OF NEW YORK, ANTHONY GLIEDMAN, AS ADMINISTRATOR OF THE HOUSING AND DEVELOPMENT ADMINISTRATION OF NEW YORK CITY, DANIEL W. JOY, AS COMMISSIONER OF THE DEPARTMENT OF RENT AND HOUSING MAINTENANCE OF NEW YORK CITY, JOSEPH B. GOLDMAN, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL AND CITY RENT AGENCY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Of Counsel

JOHN A. BUCHMAN
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

WYNNE B. STERN, JR.
FELLNER, ROVINS & GALLAY, P.C.
230 Park Avenue
New York, N.Y. 10017

ERWIN N. GRISWOLD
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

TABLE OF CONTENTS

		Page
I.	By Establishing What Amounts to a Conclusive Presumption, the Court of Appeals Has Denied Appellants the Right to Present Their Case	2
II.	The Record Clearly Establishes That There Is No Longer Any Basis for a Finding of Emergency	5
CONCLUSION		7

TABLE OF AUTHORITIES

	Page
CASES:	
Bishop v. Wood, 426 U.S. 341	4
Block v. Hirsh, 256 U.S. 135	5
Home Building & Loan Association v. Blaisdell, 290 U.S. 398	4
I.L.F.Y. Co. v. Temporary State Housing Commission, 10 N.Y.2d 263 (1961), *appeal dismissed,* 369 U.S. 795	6
Lincoln Building Associates v. Barr, 1 N.Y.2d 413 (1956), *appeal dismissed,* 355 U.S. 12	6
United States v. Carolene Products, Co., 304 U.S. 144	5
United States v. Diebold, Inc., 369 U.S. 654	4
Wolston v. Readers Digest Assn., Inc., 433 U.S. 157	4
NEW YORK STATUTES:	
Laws of New York for 1974, ch. 576	4

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

I

By Establishing What Amounts to a Conclusive Presumption, the Court of Appeals Has Denied the Appellants the Right to Present Their Case

One of the basic problems in this case is procedural. How *can* property owners in New York get a meaningful day in court? How can they get a hearing on the merits where their contentions may receive full and adequate consideration, and such an opportunity to present their case as the due process clause requires?

The appellees seek to impugn the appellants' case by saying that it rests on "their mere affidavits." (Motion, p. 4, Heading.)[1] The appellants would have welcomed an opportunity to prove their case by evidence, but this was foreclosed by the New York courts, acting pursuant to motions made by the appellees.

The complaint in this case was served on or about July 7, 1977. (R. 1, 158.)[2] Thereafter, the defendants filed their answers (in July and August, 1977), in which they asserted as a complete defense that "the allegations of the complaint failed to state a cause of action." (R. 209, 211, 213, 216.) In June, 1978, the defendants (appellees) filed motions to dismiss the complaint. (R. 219, 231.) The case was then heard in Special Term by Morton, J., on the plaintiffs' motion for summary judgment and the defendants' motion to dismiss.

On September 14, 1978, Morton, J., found "that the plaintiffs make a persuasive case as to the infirmities of rent control," but he concluded that the validity of rent control and rent stabilization laws should not "now be decided on the basis of papers alone." (R. 15.) With respect to the defendants' motion to dismiss, Morton, J., held that "an adjudication on the

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[1] The Motion to Dismiss or Affirm has been filed by counsel for the State of New York on behalf of Joseph B. Goldman, Commissioner of the New York State Division of Housing and Community Renewal. No Motion has been filed on behalf of the New York City defendants.

[2] The "R." reference is to the Record in the New York Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

merits of rent control and rent stabilization must await the trial of this action and will not be decided on these motions." (R. 17.) In conclusion, Morton, J., referred to "the dilapidated condition and abandoned status of too much of the housing stock in New York City, undoubtedly due in small or large part to the existence of rent control." He concluded (R. 20):

> Accordingly, the court directs that the parties proceed expeditiously to trial and that upon the filing of a statement of readiness and note of issue the calendar clerk shall place this matter at the head of the appropriate trial calendar.

If this order had been accepted, the plaintiffs would have had an opportunity to present their case. However, both parties appealed. Specifically, the defendants (appellees) appealed "from so much of an order made by Mr. Justice Morton . . . as denied defendants-respondents-appellants' motion for dismissal of the complaint." (R. 7)

When the case was heard by the Appellate Division, that court upheld the appeal of the present respondents, holding that the motion to dismiss the complaint should have been granted, on the ground that the "plaintiffs have failed to submit sufficient evidence to rebut the presumption that the laws in question are constitutional." (R. 262, 263.)

This was upheld by the Court of Appeals.

In light of the court's summary disposition of the case, how could the appellants have presented evidence (in the words used in the opinion of the New York Court of Appeals) sufficient to demonstrate *"beyond a reasonable doubt* that there is no factual basis" (Juris. Statement, p. 2a; emphasis supplied) and thereby rebut the presumption that the laws in question are constitutional? [3] The Court of Appeals' holding makes it impos-

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[3] It could be argued by the appellees that it was incumbent upon the appellants to demonstrate conclusively in their affidavits that there was no factual basis for the Legislature's declarations regarding the existence of a housing emergency. However, it would be unrealistic to require the appellants to present their entire case in affidavits. Appellees themselves in plicitly recognize that a "more *complete* and *current*" record is needed before it could be determined whether the continuation of rent control is justified. (Motion, p. 7; emphasis in original.)

sible, for all practical purposes, for the appellants to overcome the presumption, and thus converts the presumption into a conclusive presumption. As a result, that court's decision is contrary to the position of this Court that such a presumption cannot be made conclusive, and that "[i]t is always open to judicial inquiry whether the exigency still exists upon which the continue operation of the law depends." *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 442.

Given that the appellants are challenging the Court of Appeals' holding which prevented this case from going to trial, it comes with poor grace for the appellees to say that the appellants' case is presented on "their mere affidavits." They had no opportunity to present it otherwise. Moreover, in such a situation, the law is clear that the allegations made in the complaint must be accepted as true, and that the facts stated in "the papers," including the affidavits filed on behalf of the appellants, must be accepted as true. (See Juris. Statement, p. 6, n. 13.) As this Court very recently said in *Wolston* v. *Readers Digest Assn., Inc.,* 433 U.S. 157, 162:

> Since this case was decided on respondents' motion for summary judgment, we must construe the record most favorably to petitioner. *E.g.,* Bishop v. Wood, 426 U.S. 341, 347, n. 11 (1976); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The appellees do attempt to respond to the appellants' procedural argument by claiming that the New York rent laws "have been carefully scrutinized and implemented by the New York Court of Appeals." (Motion, p. 5.) They point to a number of cases in which the court, generally speaking, upheld several legislative acts passed in 1971 which reflected the State's policy at that time of gradual decontrol. [4] These cases, however, indicate little more than a continual willingness of the Court of Appeals to uphold all state legislation concerning the

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[4] This policy was reversed three years later when the State Legislature enacted the Emergency Tenant Protection Act of 1974 (L. 1974, ch. 576 § 4) which placed under rent stabilization those apartments which had been deregulated under the 1971 laws. The 1974 act also extended rent stabilization to apartments built between 1969 and 1973.

regulation of rents, and do not call into question the appellants' contention that in this case the court effectively immunized the rent laws from any constitutional attack.

That should not be possible under the Federal Constitution.

II

The Record Clearly Establishes That There Is No Longer Any Basis for a Finding of Emergency

The appellants do not claim that their rights to due process have been violated solely on the ground that the New York Court of Appeals has denied property owners a meaningful day in court. It is also the appellants' view that the New York's rent laws are unconstitutional because the record in this case demonstrates that a factual basis for a finding of emergency no longer exists. The many references in the record to the 37-year duration of this supposed "emergency" (R. 88-92, 134-37, 154, 235-37), as well as to the current number of apartment abandonments which annually take place (R. 41, 53, 70-74, 102, 123, 246), are sufficient to cast serious doubt on the claim that New York City is still faced with a true housing shortage which constitutes "a public exigency [which] will justify the [L]egislature in restricting property rights in land to a certain extent without compensation." *Block* v. *Hirsh,* 256 U.S. 135, 156.

In their Motion to Dismiss or Affirm, counsel for the State attempt to show that the presumption in favor of the constitutionality of New York City's rent laws is well-founded. [5] While acknowledging that the existence of a housing emergency is a constitutional prerequisite to the valid operation of these laws, they nonetheless contend that there is good reason to believe that the State Legislature had a factual basis for its

[5] A legislative enactment carries a presumption of constitutionality because it is presumed that the Legislature has acted on the basis of facts which are necessary to support the legislation. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152.

"emergency" declarations. In support of their argument, appellees refer to the statement of the Court of Appeals to the effect that (Juris. Statement, pp. la-2a):

> The need for rent control has been re-examined legislatively at intervals of three years, the most recent such review being the March 27, 1980 Report of the New York State Temporary Commission on Rental Housing, which concluded that "There is a need for continuing a form of rent regulation in those jurisdictions in which housing accomodations are presently subject to rent control or rent stablization."

This reference by the court, however, does not amount to a factual basis for a finding of emergency. To the contrary, the statement of the Temporary Commission on Rental Housing only points to the "need" for continuing rent regulation in New York City; it cannot be assumed that this need is based on a housing emergency. It is more likely that the "need" is based on political considerations, which is the very thing that the due process clause and the equal protection clause were designed to guard against. In addition, neither this statement nor the other observation made by the Court of Appeals that the Legislature has re-examined "the need for rent control" every three years contains any reference to facts which would permit a court to determine whether an emergency arguably exists. When this evidence is contrasted with that presented to the Court of Appeals in *I.L.F.Y. Co.* v. *Temporary State Housing Commission,* 10 N.Y. 263 (1961), *appeal dismissed,* 355 U.S. 12, and *Lincoln Building Associates* v. *Barr,* 1 N.Y.2d 413 (1956), *appeal dismissed,* 355 U.S. 12, the paucity (or absence) of evidence to support a finding of emergency here become clear.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

ERWIN N. GRISWOLD
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898
Attorney for Appellants

Of Counsel

JOHN A. BUCHMAN
JONES, DAY REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

WYNNE B. STERN, JR.
FELLNER, ROVINS & GALLAY, P.C.
230 Park Avenue
New York, N.Y. 10017